

UNITED STATES TAX COURT

JEREMY M. & MARGARET J. JACOBS,

Petitioners,

V.

COMMISSIONER OF INTERNAL
REVENUE,

Respondent.

Docket No. 19009-15

Filed Electronically

Judge Ruwe

PETITIONERS' OPENING POST-TRIAL BRIEF

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NATURE OF THE CONTROVERSY AND TAX INVOLVED

Respondent issued a notice of deficiency to Mr. Jeremy M. and Mrs. Margaret J. Jacobs (Petitioners) determining deficiencies of \$45,205 and \$39,823 in the Petitioners' Federal income tax for the taxable periods ended December 31, 2009 and December 31, 2010, respectively.

ISSUE TO BE DECIDED

The issue for decision is whether Petitioners are entitled to meal expense deductions of \$127,877 and \$142,223 for purposes of computing their Federal income tax for the taxable periods ended December 31, 2009 and December 31, 2010, respectively.

SUMMARY OF PETITIONERS' POSITION

Petitioners are the owners of the Boston Bruins (Bruins or Club), a National Hockey League (NHL) team based in Boston. As an NHL team, the Bruins play at least 82 games each year, half of which are played on the road in cities other than Boston. The night before each road game, the Club stays in a hotel in the “away” city. This hotel is an integral component of how the Club conducts its business. The Bruins’ employees use the hotel to prepare for the upcoming game. They do this by holding meetings to formulate and discuss game strategy, review film, and make roster and line-up changes. This preparation is indispensable to the Bruins’ goal of winning hockey games. The Club also uses the hotel to coordinate press and other public relations activities.

In addition, the Club uses the time spent at the hotel to train and condition the players, and to provide them with medical and sports treatments. These aspects of the Club’s business are essential to ensuring that the players are physically fit and healthy both for that night’s game and throughout the course of the NHL season. The Club also uses the away city hotel to give the players adequate rest. Players are expected to rest the night before the game and on game day itself to ensure that they are alert and ready for the upcoming game.

On the day of the game itself, the Bruins provide meals (Pre-Game Meals) at the hotel to all employees of the Club who are travelling with the team (Travelling

Hockey Employees). The Club's provision of the Pre-Game Meals helps maximize the time that the Club has to prepare for the game, and the meals provide an opportunity for players and coaches to meet to discuss game strategy. In addition, the meals are specifically designed to enhance and maintain the physical fitness and performance of the players. Attendance at these meals is mandatory for all players.

The Club contracts with the away city hotel to provide the Pre-Game Meals. The Club provides a customized meal menu to the hotel that sets forth the type, amount, and preparation style of each item of food that the Club requires. The hotel confirms this menu through a Banquet Event Order (BEO), executed by both the hotel and the Club. The meals are served buffet style, at the request of the Club, in a dining or banquet room designated in the BEO and other contracts.

In sum, the Bruins use the away city hotel as the base of the Club's hockey operations for the duration of their stay, and the activities that they conduct there are crucial to the Club's success. The Bruins cannot conduct these activities solely in Boston, and they cannot feasibly conduct them elsewhere in the away city.

The Bruins incur costs in connection with the provision of the Pre-Game Meals, and Petitioners deduct those costs on their Federal income tax returns.

Section 274(n)(1)¹ would limit Petitioners' deduction of those costs to 50 percent of the amounts incurred, unless one of several exceptions applies. Here, two such exceptions apply: the exception for de minimis fringes and the exception for expenses for entertainment. *See* secs. 274(n)(2)(B), 274(c)(8), respectively.

The Pre-Game Meals qualify for the exception for de minimis fringes because the meals are provided (1) on the Bruins' business premises (the away city hotels), (2) in an eating facility leased and operated by the Club, (3) for the convenience of the Club, and (4) in a non-discriminatory manner. *See* secs. 132(e)(2), 119(a)(1); *Boyd Gaming Corp. v. Commissioner*, 106 T.C. 343, 348 (1996). Petitioners also qualify for the exception for expenses for entertainment because the Pre-Game Meal expenses are incurred in connection with the provision of entertainment that is sold to customers as part of a bona fide transaction. *See* sec. 274(c)(8). Because these exceptions apply, Petitioners are entitled to fully deduct the Pre-Game Meal expenses, as reported on their Federal income tax returns.

¹ All section references are to the Internal Revenue Code (Code) in effect at all relevant times, unless otherwise indicated.

PROPOSED FINDINGS OF FACT

Petitioners' Proposed Findings of Fact hereby incorporate those facts set forth in the First Stipulation of Facts and Exhibits and the Second Amended Stipulation of Facts and Exhibits (collectively, Stips.) admitted in this case (Transcript of Trial (Trans.) 5:21-24).

Petitioners

- (1) Petitioners, Jeremy M. Jacobs and Margaret J. Jacobs, are the sole owners of Deeridge Farms Hockey Association (Deeridge), an S corporation that wholly owns Boston Professional Hockey Association, Inc. (BPHA), a Qualified Subchapter S Subsidiary of Deeridge. Stips. ¶¶ 1, 9, 11, 13, 14. Exhs. 4-J, 7-J, 8-J.
- (2) Deeridge, through BPHA, operates the Bruins. Stips. ¶¶ 15-16.
- (3) Because Petitioners are the owners of Deeridge, their Federal income tax returns incorporate flow-through items reported on Schedules K-1 issued to them by Deeridge that relate to the operation of the Bruins. Exhs. 2-J, 3-J, 5-J, 6-J.

The NHL and the Bruins

- (4) The Bruins are one of the oldest and most successful clubs in the NHL. Stips. ¶¶ 18, 66-67. Exh. 9-J, BRU0002127.

- (5) Since 1924, when the Bruins joined the NHL, they have won the Stanley Cup, the NHL's championship, six times, including during the 2010-2011 season. Stips. ¶¶ 67, 74. Trans. 14:14-24.
- (6) The NHL includes 30 hockey clubs that were divided, during the years at issue, between two geographical conferences: the Eastern Conference and the Western Conference. Stip. ¶ 22.
- (7) These conferences included three divisions each: the Atlantic, Northeast, and Southeast divisions in the Eastern Conference; and the Pacific, Central, and Northwest divisions in the Western Conference. Stips. ¶¶ 23-24.
- (8) The Bruins, who play their home games in Boston, were assigned to the Northeast Division of the Atlantic Conference during the years at issue. Stips. ¶¶ 71, 77.
- (9) As an NHL club, the Bruins provide entertainment to hockey fans who attend their games, watch the games on television, and listen to them on the radio. Stips. ¶¶ 68, 235.
- (10) Television and radio stations broadcast the Club's home and away games pursuant to contracts entered into between BPHA and the television and radio broadcasters, and also pursuant to contracts entered into between the NHL, as agent for the Bruins and the other NHL clubs, and the broadcasters. Stips. ¶¶ 51, 235-239. Exhs. 575-J to 577-J.

- (11) In both 2009 and 2010, the Club earned over a quarter of its revenue from the broadcasting contracts pursuant to which its home and away games were aired. Exh. 578-J, BRU0000527.
- (12) Similarly, in both 2009 and 2010, the Club earned over half of its revenue from the sale of tickets to fans who watched its games. Exh. 578-J, BRU0000527.
- (13) As part of providing entertainment to their fans, the Bruins' business involves winning as many hockey games as possible so that the Club can qualify for the playoffs and hopefully win the NHL's championship, the Stanley Cup. Trans. 15:24-16:15, 17:20-24. *See also* Trans. 24:22-25, 52:9-18, 73:2-8, 129:24-130:11.
- (14) In the competitive environment of the NHL, winning these games is not a given—preparation and hard work is required. Trans. 14:25-15:20, 17:16-24, 26:15-23, 48:15-16.

The Bruins' Schedule and Travel Requirements

- (15) NHL clubs are dispersed across the United States and Canada, requiring the clubs, including the Bruins, to travel to other cities for approximately half of their games. Stips. ¶¶ 34-35, 48.
- (16) NHL clubs play 41 regular season away games each year. Stips. ¶¶ 40-41. Trans. 18:9-16.

- (17) In addition, NHL clubs travel to and play several away pre-season games, and the NHL clubs that qualify for the playoffs are required to travel to and play away post-season games. Stips. ¶¶ 38, 42, 44, 47.
- (18) Playing in these away games is an essential component of the Bruins' business, and doing so is a requirement to remain an NHL member club. Stip. ¶ 65. Exh. 9-J, BRU0002132. *See also* Stip. ¶ 48.
- (19) The NHL's rules, as well as the Collective Bargaining Agreement between the NHL and the NHL Players Association, requires that the Bruins arrive in an away city well in advance of the game. Stips. ¶¶ 59-61. Exh. 10-J, BRU0002248; Exh. 11-J, BRU0001755.
- (20) This usually means arriving the night before a game. Trans. 18:23-19:3.
- (21) Moreover, if the Bruins fail to play an away game, they forfeit the game, lose playoff race points, are subject to financial penalties imposed by the NHL, and must indemnify the NHL club to which the game is forfeited for loss of revenue and other expenses. Stips. ¶¶ 62-64. Exh. 9-J, BRU0002132, BRU0002142-43; Exh. 10-J, BRU0002248.
- (22) Beyond these League-wide rules, the Club also has practical reasons to travel to an away city the day before a game: It helps the Club ensure that players receive an appropriate amount of rest and pre-game nutrition, and it

affords the Club as much time as possible to prepare for the upcoming game.

Trans. 19:4-8, 19:19-20:4, 63:2-25.

The Bruins' Business Activities Associated with Away Games

The Bruins' Travelling Hockey Employees

- (23) The Bruins' business is composed of a variety of functions, including the Club's hockey operations, scouting, and executive and business operations.

Stip. ¶ 263. Exh. 580-J.

- (24) The Club's Travelling Hockey Employees consist of between 20 and 24 hockey players plus the head coach and varying numbers of additional personnel, including assistant coaches, medical personnel, trainers, equipment managers, travel logistics managers, public relations/media personnel, and other employees. Stip. ¶ 78. Trans. 20:25-22:1.

- (25) The Club's Travelling Hockey Employees travel to every away game. Stip. ¶ 79. Trans. 20:25-22:1.

The Day Before an Away Game

- (26) The day before an away game, the Club's Travelling Hockey Employees take a charter flight to the away city and check into a hotel there, often arriving in the late afternoon or evening, but occasionally in the early morning hours. Stips. ¶¶ 80, 130-131. Trans. 18:21-19:18, 42:17-43:20.

- (27) The purpose of the hotel stay is all business; the overnight stay is not some mere boondoggle for the players. Trans. 63:20-64:20.
- (28) If the Club arrives at an away city hotel early enough the day before it plays an away game, the Club conducts its business at the hotel that evening. Stip. ¶ 139. Trans. 62:20-63:19, 147:14-148:1.
- (29) For example, on the day they arrive, and if they arrive in sufficient time, players receive physical therapy, massages, and other medical treatments; the coaching staff meets to discuss game strategy, review video, and discuss player issues; and other Club employees perform their own responsibilities. Stips. ¶ 139. Trans. 23:9-24:4 (player activities); Trans. 49:8-50:2 (coaching activities); Trans. 56:3-20 (public relations activities); Trans. 57:8-25 (travel management/logistics activities); Trans. 108:11-21 (medical/training activities).
- (30) The night before the away game, players are subject to an 11:00 p.m. curfew. Stip. ¶ 144.
- (31) The Club may fine a player or scratch him from a game if he does not abide by this curfew. Stip. ¶ 145.
- (32) Although the players sleep, other Club employees, such as the trainers who often are required to respond to sick or injured players, remain “on-call” at the away city hotel all night. Stip. ¶ 146. Trans 40:18-25.

Game Day Morning

- (33) Every morning before an away city evening game, the Club holds a pre-game breakfast, generally between 8:00 a.m. and 10:00 a.m. Stips. ¶¶ 147, 149.
- (34) The Club holds the breakfast in the hotel banquet or meeting room assigned to the Club, as set forth in the contracts entered into between the Club and the hotel (Meal Room). Stips. ¶¶ 148, 197.
- (35) The Club's employees are informed of the time of the meals and location of the Meal Room in an away trip itinerary, which is provided to every Travelling Hockey Employee for each away game or set of away games (Away Trip Itinerary). Exhs. 325-J to 402-J. Trans. 60:17-61:16.
- (36) The pre-game breakfast is made available to all Travelling Hockey Employees and is mandatory for all players. Trans. 65:2-66:15. *See also* Trans. 116:8-16.
- (37) In this regard, one of the Club's Travelling Hockey Employees is responsible for ensuring that every player arrives at and eats the breakfast, and pursuant to the Club's rules, players may be fined or scratched from games if they are absent or late. Trans. 66:23-67:9, 69:2-16, 70:14-71:16.
- (38) The Club uses the pre-game breakfast to conduct its business. Stips. ¶¶ 154-157, 159-162.

- (39) For example, the Club's head coach, with input from and participation by the assistant coaches, may hold meetings during the breakfast. These meetings may include watching game film and discussing strategies for the upcoming game. Stip. ¶ 157. Trans. 25:1-26:3, 29:13-25, 50:15-51:8.
- (40) Coaches may also speak to players one-on-one or in small groups during the breakfast. Stips. ¶ 157. Trans. 23:21-24:4, 29:2-30:17.
- (41) These activities are an important component of the Club's preparation for that game, and are critical to the Club's success. Trans. 26:15-23, 27:23-28:2, 52:9-22.
- (42) Similarly, the coaches meet among themselves, with the medical trainers, and with the general manager to manage the player roster, including by making adjustments or substituting players when necessary due to illness, injury, strategy, or performance issues. Trans. 50:3-14, 53:8-25.
- (43) Finally, the Club's public relations staff may meet with players during breakfast to discuss upcoming interviews, published stories, or other public-facing Club issues. Stips. ¶¶ 154-155. Trans. 28:19-29:1, 56:3-24.
- (44) Following the pre-game breakfast, the Club either remains at the hotel or travels to the opposing NHL club's arena or practice facility. Stip. ¶ 163. Trans. 80:20-81:7.

- (45) If the Club travels to the arena or practice facility, it does so immediately following the pre-game breakfast. Stip. ¶ 164.
- (46) While there, the Club practices for the upcoming game. Stips. ¶¶ 166-167.
- (47) On days when the Club does not participate in a game day practice skate, the head coach holds a formal team meeting during or immediately after the breakfast, which includes watching game film and discussing strategies for the upcoming game. Trans. 81:25-82:6.

Game Day Afternoon

- (48) On days when the Club plays an away game in the evening, the Club holds a pre-game lunch, made available to all Travelling Hockey Employees, generally between 12:15 p.m. and 2:15 p.m. Stips. ¶¶ 173, 175. Trans. 82:15-83:12. *See also* Trans. 117:2-10.
- (49) As with the breakfast, the Club holds the pre-game lunch in the Meal Room, and informs its employees of the time and location of the meal in the Away Trip Itinerary. Stips. ¶¶ 174, 197. Exhs. 325-J to 402-J. Trans. 60:17-61:16.
- (50) At the lunch, coaches may conduct small group and one-on-one meetings, and the public relations staff may meet with players one-on-one to discuss anticipated media inquiries and interviews. Stips. ¶¶ 177-178.

- (51) Just as with the breakfast, the lunch is mandatory, and players can be fined or scratched from games if they are absent. Trans. 69:2-16, 70:14-71:16, 83:20-22.
- (52) Following lunch, the Club provides time for players to take a nap because the players' responsibilities include obtaining sufficient rest before a game. Stips. ¶¶ 179-180. Trans. 46:2-10, 84:12-22.
- (53) Rest, including these afternoon naps, is important in light of the game, training, conditioning, practice, and travel schedule required of the players, and it is an important aspect of the Club's success. Trans. 47:2-11, 115:4-25.
- (54) On days when the Club plays an away game in the evening, the Club also makes available, generally between 3:15 p.m. and 5:15 p.m., a pre-game snack. Stips. ¶¶ 181, 183.
- (55) This snack, held in the Meal Room, is made available to all Travelling Hockey Employees and is identified in the Away Trip Itinerary. Stip. ¶ 182. Exhs. 325-J to 402-J. Trans. 60:17-61:16, 85:9-17.

Alternative Schedule in the Event of an Afternoon Game

- (56) Occasionally, the Club will play an away game in the afternoon, rather than in the evening. Stip. ¶ 186.

- (57) When the Club plays an away game in the afternoon, the Club holds a pre-game brunch meeting in lieu of the breakfast and lunch meetings that are held before evening games. Stip. ¶ 187.
- (58) The Club generally holds the pre-game brunch for several hours between 8:00 a.m. and 12:30 p.m., depending on the time of the afternoon game. Stip. ¶ 188.
- (59) As with the breakfast and lunch, the pre-game brunch is made available to all Travelling Hockey Employees, is mandatory for all players, is identified in the Away Trip Itinerary, and involves meetings, strategy discussions, film review, and other game preparation and media-related activities. Stips. ¶¶ 189-191. Exhs. 325-J to 402-J. Trans. 60:17-61:16, 70:14-71:16, 90:6-19, 91:3-92:4.

Training/Treatment Activities at the Hotel

- (60) Throughout the entire course of their stay at the hotel, the players' responsibilities also include receiving sports and medical treatments, and performing strength and conditioning exercises. Stip. ¶ 139. Trans. 31:6-22 (generally); Trans. 37:23-38:8, 39:13-24 (sports/medical treatments); Trans. 109:9-21, 137:8-22 (strength/conditioning).

- (61) These activities must occur on a daily basis, requiring them to be performed at the away city hotels. Trans. 41:1-42:16, 112:4-20 (sports/medical treatments); Trans. 35:4-12, 110:5-111:2 (strength/conditioning).
- (62) The players receive these sports and medical treatments, as well as strength and conditioning training, from the Club's athletic trainers. Stip. ¶ 139. Trans. 108:11-109:21.
- (63) The players and trainers use various facilities at the hotel for these purposes, including suites, player rooms, the fitness center, the pool, and hot tubs. Stip. ¶ 139. Trans. 32:3-24, 39:17-24, 108:11-109:8, 109:22-110:4.
- (64) If a player fails to perform strength and conditioning exercises at an away city hotel, it increases the likelihood of his being injured. He also may lose his competitive edge and possibly his job. Trans. 34:22-35:3, 127:1-4, 127:21-128:2.
- (65) Similarly, if a player fails to receive sports and medical treatment when needed, it hinders his ability to play in a game later that evening and in games throughout the remainder of a season, and it increases the likelihood of his being injured. Trans. 41:10-24, 128:7-13.
- (66) Accordingly, a player's receipt of sports and medical treatments, as well as his performance of strength and conditioning activities, while at the away city hotel are important aspects of the Club's success. Trans. 41:25-42:16,

127:1-128:13 (sports/medical treatments); Trans. 37:8-12

(strength/conditioning).

Game and Post-Game Activities

- (67) Following the pre-game snack at the hotel (or brunch in the case of an afternoon game) and two hours before the game, the Club travels to the away city arena. Stip. ¶ 185.
- (68) Upon arrival at the away city arena, players stretch and get dressed in their uniforms. Stip. ¶ 193.
- (69) Each NHL hockey game includes 60 minutes of playing time and lasts approximately two and a half hours from start to finish. Stip. ¶ 194.
- (70) The Club generally stays at the arena for about an hour after the game. During this time, the players shower, change their clothes, and meet with the media. Stip. ¶ 195.
- (71) When it leaves the away city arena, the Club boards a charter bus that takes the Travelling Hockey Employees directly to the away city airport, where they board a plane to travel to the next away city or back to Boston. Stip. ¶ 196.
- (72) It is not unusual for the Club to play “back to back” games on successive nights. Trans. 34:3-15, 43:7-20. *See, e.g.*, Exhibit 12-J, BRU0000515, BRU0000518, BRU0000522.

- (73) During lengthy away trips, the Club may spend an extra day in an away city hotel rather than return to Boston. *E.g.*, Exh. 326-J, BRU0000244; Exh. 330-J, BRU0000262; Exh. 331-J, BRU0000264-265. Trans. 85:18-86:8.
- (74) When this occurs, the Club may use the time spent at the away city hotel to continue its work to prepare for upcoming games. Trans. 86:9-14.

Importance of the Away City Hotel

- (75) The opposing NHL club's arena or practice facility is available to the Bruins only for a limited time. Moreover, the Club cannot perform certain activities at the arena (e.g., serve the Pre-Game Meals), and it cannot adequately perform other activities (e.g., film review, meetings) exclusively at the arena. Trans. 86:24-87:1, 88:12-24.
- (76) Similarly, because the Club's preparation for away games involves game day decisions and activities, it would not be possible for the Travelling Hockey Employees to perform their responsibilities exclusively while in Boston. Trans. 51:14-52:8 (film review); Trans. 54:22-55:5 (team meetings); Trans. 56:21-57:7 (public relations); Trans. 58:10-59:16 (travel logistics); Trans. 39:2-16, 41:1-9 (sports/medical treatments); Trans. 35:4-12 (training/conditioning).
- (77) The activities performed at the hotel are not optional—they are mandatory aspects of the Travelling Hockey Employees' responsibilities and duties.

Trans. 25:25-26:3, 27:13-22 (player film review); Trans. 30:15-31:5 (player meetings); Trans. 33:4-9 (player training/conditioning); Trans. 37:23-38:8 (player sports/medical treatments); Trans. 46:2-10 (player rest); Trans. 49:8-50:10 (coaching activities); Trans. 50:3-20 (public relations activities); Trans. 57:8-25 (travel logistics activities); Trans. 108:7-109:8 (player training/conditioning and sports/medical treatments).

- (78) The most important elements related to a player's ability to perform in the away games (conditioning, rest, and nutrition) take place at the away city hotels. Trans. 47:2-17.

Contracts Related to Away City Hotels

- (79) Because the Club cannot adequately prepare for away games without the use of the away city hotels, it begins to identify and contract with hotels as soon as the NHL schedule is released for each season, usually several months before the season begins. Trans. 144:9-145:8.
- (80) These contracts provide for hotel sleeping rooms and suites, as well as for the Meal Room in which the Pre-Game Meals are served. Stips. ¶¶ 82-84, 92. Exhs. 14-J to 72-J. Trans. 163:4-18.
- (81) The Club selects the away city hotels at which it stays based on their location, the level of service provided by the hotel, and the quality of the food served during the Pre-Game Meals. Trans. 46:11-22, 145:12-22.

- (82) The Club also selects away city hotels based on their amenability to various concessions requested by the Club that better allow the Club to conduct its business activities while at the hotels. Trans. 145:23-25, 146:22-147:13.
- (83) For example, the Club requests, and the contracts with the hotels typically provide for, expedited check-in, generally with a separate area for Club employees to receive pre-coded keys, at the specified time of arrival to ensure that the Travelling Hockey Employees are able to get to their rooms as quickly as possible to begin their game preparation activities. Stip. ¶ 137. *E.g.*, Exh. 23-J, BRU0000091; Exh. 56-J, BRU000819; Exh. 72-J BRU0000949. Trans. 147:17-148:6, 155:19-24.
- (84) In addition, the Club requests, and the contracts typically provide for, a late check-out, usually as late as 5:00 p.m. or 5:30 p.m., so that the Club can perform its business activities at the hotel right up until the Club travels to the arena for the away game. Stip. ¶ 90. *E.g.*, Exh. 14-J, BRU0000014; Exh. 30-J, BRU0000143; Exh. 35-J, BRU0000166. Trans. 148:7-18.
- (85) The contracts also provide for complimentary and upgraded suites for the head coach, assistant trainer, general manager, president, and on-site travel coordinator because their hotel rooms are used to hold meetings and otherwise conduct business activities at the hotel. Stip. ¶ 86. *E.g.*, Exh. 23-

J, BRU0000091; Exh. 46-J, BRU0000765; Exh. 48-J, BRU0000777. Trans. 148:19-149:19.

- (86) For hotels located in away cities that are home to an NHL club in the Eastern Conference, the hotel contracts often contain a provision guaranteeing room availability during the post-season should the Club qualify for the playoffs. Stip. ¶ 91. *E.g.*, Exh. 28-J, BRU0000132; Exh. 52-J, BRU0000794; Exh. 64-J, BRU0000863.
- (87) Because these contracts are critical to the Club's stay at the hotel, the Club's staff carefully reviews each provision of the contracts to ensure that they are consistent with the Club's needs, and will negotiate changes to those agreements as necessary. Stip. ¶ 109. Trans. 158:10-159:14.
- (88) The Club accepts the terms of the hotel contract by executing the contract and returning it to the hotel. *See, e.g.*, Exh. 21-J, BRU0000071; Exh. 25-J, BRU0000120; Exh. 33-J, BRU0000164.
- (89) Given the hotel stay's importance, the Club travels with a logistics manager to ensure that the entire hotel stay operates as smoothly as possible. Trans. 57:8-58:22.
- (90) Once it has identified and stayed at a hotel that meets its requirements, the Club tends to stay there for each of its games during a particular season, as well as in subsequent seasons. Stip. ¶ 81. Trans. 146:1-11, 157:24-158:1.

Pre-Game Meals

- (91) As described above, on game days, the Bruins hold Pre-Game Meals at the away city hotels—a pre-game breakfast, lunch, and snack on days when the Bruins have an evening game, and a pre-game brunch on days when the Bruins have an afternoon game. Stips. ¶¶ 147, 173, 181, 187.
- (92) The Pre-Game Meals are held at the hotel because it would be impractical to hold the Pre-Game Meals at the away arena or a local restaurant, as doing so would not be conducive to the Club’s schedule or the nutritional requirements of the players. Trans. 65:8-24, 75:15-76:4, 78:20-79:24, 88:5-11, 88:25-89:7.
- (93) Although the Pre-Game Meals are specifically designed with the players’ nutritional needs in mind, the Pre-Game Meals are made available to all the Club’s Travelling Hockey Employees. Trans. 65:25-66:15 (breakfast); Trans. 82:15-83:12 (lunch); Trans. 85:9-17 (snack); Trans. 91:21-92:4 (brunch).
- (94) The hotel contracts specify that the Pre-Game Meals will be provided at the hotel, and they also include the dates, times, and expected number of attendees at the meals. Stip. ¶ 96. *E.g.*, Exh. 23-J, BRU0000090; Exh. 24-J, BRU0000109; Exh. BRU 40-J, BRU0000745.

- (95) The Club initiates the meal contracting process by providing a custom meal menu to the hotel that lists each type and quantity of food requested at each Pre-Game Meal. Stips. ¶¶ 98, 102, 104. Exhs. 73-J to 81-J. Trans. 151:7-20, 166:11-21, 167:14-168:2.
- (96) Based on the custom meal menu, the hotel prepares and sends to the Club a BEO, which sets forth the date, time, Meal Room, number of guests, menu, and pricing for each Pre-Game Meal. Stip. ¶ 104. Exhs. 82-J to 178-J. Trans. 169:18-170:6.
- (97) To the extent that the BEO deviates from the custom meal menu, the Club contacts the hotel to have this corrected. Stip. ¶ 106.
- (98) Once the BEO meets the Club's needs, the Club accepts the offer set forth in the BEO by executing that document and returning it to the hotel for counter-signature. Stip. ¶ 105. Trans. 170:2-6.
- (99) The Pre-Game Meals are held in the Meal Room assigned to the Club, as set forth in the hotel contract and/or BEO signed by the Club and the hotel, and the meals themselves are prepared in the hotel's kitchen by the hotel's chefs or culinary team. Stip. ¶ 197. Exhs. 82-J to 178-J. Trans. 170:25-171:16.
- (100) Some of the hotel contracts restrict the Club's ability to consume outside food in the Meal Room. *E.g.*, Exh. 19-J, BRU0000052; 39-J; Exh. BRU0000718; Exh. 70-J, BRU00000931. Trans. 161:25-162:9.

- (101) The Club negotiates to have the Meal Room provided at no additional charge; this would not be possible absent the Club's agreement to have the hotel operate that room and provide the Pre-Game Meals, and the Club's agreement to pay for those meals. Trans. 149:20-150:20.
- (102) At the Club's request, the setup of the Meal Room always consists of round tables with chairs and buffet stations where food and beverages are served. Stip. ¶ 198. Trans. 172:22-173:1.
- (103) Given the nature of these meetings and the desire to avoid distractions, the Club requests that the Meal Room location not be disclosed to the public, and the Club restricts access to the Meal Room to Club employees. Stip. ¶ 199. Trans. 66:16-22, 169:6-17.
- (104) The only exception to this general rule is that hotel waiters, waitresses, and dining captains are available in the Meal Room to ensure that the food in the buffet does not run out, to provide any additional items that the Travelling Hockey Employees may request, and to otherwise serve the Pre-Game Meals. Trans. 159:15-160:25, 177:10-178:11.
- (105) In return for this service, the hotel contracts and BEOs provide for, and the Club pays, a service charge of up to 22 percent. *E.g.*, Exh. 27-J, BRU0000129; Exh. 35-J, BRU0000167; Exh. 100-J, BRU0000392; Exh. 136-J, BRU0001130. Trans. 161:1-15, 172:15-21, 183:9-17.

- (106) As a cost-saving measure, the Club may inform the hotels that fewer than the total number of Travelling Hockey Employees will attend the Pre-Game Meals. Trans. 186:4-22.
- (107) Irrespective of the number of employees that the Club reports to the hotels will attend the Pre-Game Meals, the Club always orders the same amount of food, an amount intended to feed all Travelling Hockey Employees. Stip. ¶ 200. Trans. 168:3-24, 174:6-25, 175:18-176:6.

Purpose of the Pre-Game Meals

- (108) The players have exacting nutritional needs that must be met if they are to perform at their peak. Trans. 69:2-16, 75:6-14, 119:3-8, 156:4-12.
- (109) Accordingly, the Pre-Game Meal menus are carefully selected by the Club's athletic trainers to meet specific nutritional guidelines that ensure peak player performance on game days and over the course of the NHL season. Trans. 65:2-14, 73:9-17.
- (110) In this regard, the Pre-Game Meals provide a nutritious and balanced selection of foods, including foods from all essential food groups, generous portions, and a wide variety of choices. Stip. ¶ 203.
- (111) Although the Pre-Game Meals include certain fatty foods—such as bacon, alfredo sauce, and ice cream—these foods are typically eaten by the staff

and are infrequent indulgences for the players. Trans. 78:7-19, 99:16-100:1, 139:14-19.

- (112) The Club monitors each player's health throughout the course of the season, and if a player was not eating properly, the Club might scratch him from playing in games. Trans. 139:20-140:19.
- (113) With little exception (e.g., regarding the type of cereal), all Pre-Game Meals are the same at every away city hotel, and all the food options available on the Pre-Game Meal buffets remain consistent from hotel to hotel. Stip. ¶ 201.
- (114) The Club keeps the food options at the Pre-Game Meals consistent because players eat the same meal before every game, to avoid gastric issues during a game. Trans. 126:10-21.
- (115) In addition to ensuring that the players receive proper nutrition, the Pre-Game Meals serve a variety of other purposes. For example, the Pre-Game Meals provide an opportunity for coaches to meet with players individually or in small groups and for the public relations staff to meet with players and coaches to prepare them for interviews and media inquiries. Stips. ¶¶ 155, 157, 177-178, 189-190. Trans. 74:17-25, 91:17-20.
- (116) The Pre-Game Meals are also timed to immediately precede or follow other events (e.g., meetings, pre-game skate) held by the Club, thereby affording

as much time as possible to prepare for the game. Trans. 73:22-74:10,
75:15-76:4, 160:3-13.

- (117) Finally, the Pre-Game Meals provide an opportunity to inform players and other Club employees of updates to their schedule; absent these updates, players and other employees may not know where to be to prepare for the upcoming game. Trans. 81:8-24.

POINTS RELIED UPON

Petitioners are allowed to deduct the full cost of the Pre-Game Meals that the Bruins provide to their Travelling Hockey Employees because the meals qualify as de minimis fringe benefits under section 132(e)(2). This is because meals provided by an employer on a non-discriminatory basis are de minimis fringes if:

(1) The eating facility [where the meals are provided] is owned or leased by the employer, (2) the facility is operated by the employer, (3) the facility is located on or near the business premises of the employer, (4) the meals furnished at the facility are provided during, or immediately before or after, the employee's workday, and (5) the annual revenue derived from the facility normally equals or exceeds the direct operating costs of the facility (the revenue/operating cost test).

Boyd Gaming, 106 T.C. at 348-49 (also stating that the revenue/operating cost test is satisfied if the meals are provided for the employer's convenience). The Club satisfies this test.

As an initial matter, the Pre-Game Meals are provided on the Bruins' business premises. The Bruins' employees perform myriad activities essential to the Club's business while at the away city hotels; indeed, the Club requires them to perform these activities at the hotels. Trans. 23:9-24:4 (player activities); Trans. 49:8-50:2 (coaching activities); Trans. 56:3-20 (public relations activities); Trans. 57:8-25 (travel management/logistics activities); Trans. 108:11-21 (medical/training activities). These activities include holding and attending

meetings to formulate and discuss strategy, reviewing game film, making roster and line-up changes, performing strength training and conditioning, and administering and receiving sports and medical treatments. *See id.* In light of these activities, and the nature of the Club's business more generally (i.e., a travelling professional hockey club), the away city hotels serve as the Bruins' business premises for the duration of their stay there. *See Vanicek v. Commissioner*, 85 T.C. 731, 740 (1985) (evaluating business premises based on "consideration of the employee's duties as well as the nature of the employer's business"); *Benninghoff v. Commissioner*, 71 T.C. 216, 221 (1978) ("The touchstone of the business premises test is the lodging's relationship to the business activities of the employer."), *aff'd*, 614 F.2d 398 (5th Cir. 1980).

The Bruins also satisfy the revenue/operating cost component of the *Boyd Gaming* test, which requires that meals be provided for the convenience of the Club. The Club requires that the players be present at the away city hotels during the Pre-Game Meals, and that they actually attend and eat those meals. Trans. 60:17-61:16, 65:2-66:15, 69:2-16, 70:14-71:16, 90:6-19, 91:3-92:4. Under these circumstances, the meals are provided for the convenience of the Club. *See Commissioner v. Kowalski*, 434 U.S. 77, 93 (1977) (holding that the convenience of the employer standard is satisfied "where 'an employee must accept . . . meals or lodging in order properly to perform his duties'" (quoting S. REP. NO. 1622, 83d

Cong., at 190 (1954))); *Boyd Gaming Corp. v. Commissioner*, 177 F.3d 1096, 1101 (9th Cir. 1999) (relying on *Kowalski* and finding the convenience of the employer standard satisfied where employees were subject to a “stay-on-premises” policy), *acq.*, AOD 1999-010, *rev’g* T.C. Memo. 1997-445.²

Finally, the Club satisfies the remaining elements of the *Boyd Gaming* test because the Club

- leases the Meal Room pursuant to contracts with away city hotels;
- contracts with the hotels to operate the eating facilities;
- provides the meals during the course of the players’ business day; and
- provides the meals in a manner that does not discriminate based upon whether an employee is highly compensated.

Petitioners are therefore entitled to fully deduct the costs of the Pre-Game Meals.

See Boyd Gaming, 106 T.C. at 348-49.

² Although not controlling authority pursuant to this Court’s rule in *Golsen v. Commissioner*, 54 T.C. 742 (1970), *aff’d* on other grounds, 445 F.2d 985 (10th Cir.), the Ninth Circuit’s decision in *Boyd Gaming* is nonetheless persuasive, particularly in light of Respondent’s acquiescence in that decision. *See* AOD 1999-010 (Aug. 30, 1999), available at <https://www.irs.gov/pub/irs-aod/boydgame.pdf>. Moreover, although the Ninth Circuit took issue with the Tax Court’s interpretation of the Supreme Court’s statement in *Kowalski* that an “employee must accept . . . [the] meals . . . in order properly to perform his duties,” in the Bruins’ case, this test would be satisfied in any event, because one of the players’ duties is to attend and eat the Pre-Game Meals. Trans. 60:17-61:16, 65:2-66:15, 69:2-16, 70:14-71:16, 90:6-19, 91:3-92:4.

Notably, and as Respondent’s Pre-Trial Memorandum acknowledges, at page 51, “[i]f petitioners substantiate that the meals were provided to the players . . . for [the Club’s] convenience pursuant to I.R.C. 119(b)(4), the remaining pre-game meals provided to the other [Club] employees would be considered provided for the convenience of” the Club.

Additionally, the Club's provision of Pre-Game Meals to its Travelling Hockey Employees involves expenses for entertainment that is sold to its customers, thereby providing Petitioners an alternative basis on which to fully deduct those expenses. Sec. 274(n)(2)(A). The Bruins provide hockey entertainment to their fans who pay to attend their games, watch the Bruins on TV, and listen to them on the radio. Stips. ¶¶ 68, 235. The Pre-Game Meals are a critical element of providing that entertainment, as they help ensure, among other things, that players will be able to perform at their peak. Trans. 69:2-16, 75:6-14, 119:3-8, 156:4-12. The Pre-Game Meal expenses are fully deductible because they represent costs incurred in connection with producing the entertainment. *See* sec. 1.274-2(f)(2)(ix), Income Tax Regs.

ARGUMENT

Section 162 permits a deduction for all ordinary and necessary business expenses. Section 274(a) disallows a deduction for certain meal and entertainment expenses otherwise deductible under section 162, unless the expenses are associated with the active conduct of the taxpayer's trade or business. Respondent does not challenge that Petitioners' Pre-Game Meal expenses are associated with the active conduct of Petitioners' trade or business.

For meal and entertainment expenses that are not disallowed by section 274(a), section 274(n) nonetheless limits the deduction to 50 percent of the amount otherwise allowable, unless one of several exceptions applies. Petitioners' Pre-Game Meal expenses satisfy two such exceptions: the de minimis fringe exception and the entertainment sold to customers exception.

I. The De Minimis Fringe Exception Applies.

Section 274(n)(2)(B) exempts from the 50-percent haircut expenses that are excludable from an employee's income due to the "de minimis fringe" exception found in section 132(e). A de minimis fringe includes the operation by an employer of an eating facility for employees. Sec. 132(e)(2). Although there is a web of Code and regulatory provisions that establish the exception, the Tax Court has succinctly described the requirements of this exception as follows:

[E]mployee meals provided on a nondiscriminatory basis are a de minimis fringe benefit under section 132(e) if:

(1) The eating facility is owned or leased by the employer, (2) the facility is operated by the employer, (3) the facility is located on or near the business premises of the employer, (4) the meals furnished at the facility are provided during, or immediately before or after, the employee's workday, and (5) the annual revenue derived from the facility normally equals or exceeds the direct operating costs of the facility (the revenue/operating cost test).

Boyd Gaming, 106 T.C. at 348 (citing sec. 132(e)(2); sec. 1.132-7(a), Income Tax Regs.).

The Court in *Boyd Gaming* also explained the “revenue/operating cost test,” stating that “an employer may disregard the cost and revenue for any employee meal that the employer reasonably determines is excludable from gross income under section 119,” and that “[s]ection 119(a)(1) allows an employee to exclude from income the value of any meals furnished by an employer for the employer's convenience and on the employer's premises.” *Id.* at 348-49 (citations omitted).

As described below, Petitioners satisfy each of the foregoing requirements.

A. The Club's Business Premises Include the Away City Hotels.

Section 132(e)(2) treats the operation of an eating facility as a de minimis fringe if “such facility is located on or near the business premises of the employer.” Similarly, section 119, which for these purposes is incorporated into section 132(e)(2), requires that the meals be furnished “on the business premises of the

employer.” An identification of the Club’s business premises is therefore central to determining the applicability of the de minimis fringe exception.

1. The away city hotels are the Club’s business premises.

The hotels where the Club stays when it travels to away cities function as the Club’s business premises. Although no applicable authority, including Tax Court case law, defines the term “business premises” for purposes of section 132(e), that term has been defined for purposes of section 119 in Treasury Regulations and in judicial opinions. The term should be understood to mean the same thing in both Code provisions. *See Western Nat’l Mut. Ins. Co. v. Commissioner*, 102 T.C. 338, 359 (1994) (“In employing the traditional tools of statutory construction, a court should assume that Congress uses language in a consistent manner, unless otherwise indicated.”), *aff’d*, 65 F.3d 90 (8th Cir. 1995). The following analysis therefore focuses on the meaning of “business premises” under section 119 and applies that meaning equally under section 132(c).

Under section 1.119-1(c)(1), Income Tax Regs., the term “business premises of the employer” means “the place of employment of the employee”—in other words, where the employee works. This regulatory language does not limit the place of employment to a single permanent office or fixed location. *See id.* Moreover, “section 119 does not require that lodging [or meals] be furnished in the *primary* business structure of the employer in order to be considered on the

business premises.” *Benninghoff*, 71 T.C. at 220 (emphasis added). This is consistent with the legislative history of section 119, referred to in *Benninghoff*, which makes clear that, for example, a business premises can even include leased lands (or national forests used under permit) used by a cowhand to herd his employer’s cattle. See H.R. CONF. REP. NO. 83-2543, at 27 (1954); see also PLR 8405075 (Nov. 2, 1983) (“[O]wnership by the employer of the lodging or the place where the meals are furnished is not intended by Congress to be the crucial test, nor even an essential element of the meaning of ‘business premises.’”). The Court of Claims has echoed these interpretations of section 119, holding that “the statutory language ‘on the business premises of the employer’ infers a functional rather than a spatial unity.” *Adams v. United States*, 585 F.2d 1060, 1066 (Ct. Cl. 1978).

Since the focus is on the *function* of the location in question, see *Adams*, 585 F.2d at 1066, courts rely on factual inquiries to decide what constitutes the business premises of an employer under section 119. This requires inquiries as to whether the meals are furnished in a place where “the employee performs a significant portion of his duties or . . . where the employer conducts a significant portion of his business.” *Commissioner v. Anderson*, 371 F.2d 59, 67 (6th Cir. 1966). Indeed, the Tax Court has stated that the taxpayer need only show that it “‘carries on some of its business activities’” (rather than a significant portion) on

the premises. *Benninghoff*, 71 T.C. at 220 (quoting *Dole v. Commissioner*, 43 T.C. 697, 707 (1965)). Accordingly, “[t]he touchstone of the business premises test is the lodging’s [or meals’] relationship to the business activities of the employer.” *Id.* at 221; *see also* General Counsel Memorandum 39246, 1984 WL 265024 (Jan. 8, 1982) (quoting the same as the applicable standard). “That is, ‘[t]he property must bear an integral relationship to the business activities of the employer.’” *Vanicek*, 85 T.C. at 740 (quoting *Benninghoff*, 71 T.C. at 221).

In evaluating this relationship, courts take into consideration the nature of the business itself. *See id.* at 739-40 (“The extent or boundaries of the business premises in each case is a factual question whose resolution follows a consideration of . . . the nature of the employer’s business.”); *Lindeman v. Commissioner*, 60 T.C. 609, 614-15 (1973) (same), *acq.*, 1973-2 C.B. 2. As a result, the evaluation of a business premises for one type of business (e.g., a manufacturer, communications company, or accounting firm) may be different than that of another (e.g., a travelling national sports team). There is no one-size-fits-all rule. *Lindeman*, 60 T.C. at 617 (interpreting the phrase “on the business premises” to be “at best elusive and admittedly incapable of generating any hard and fast line”).

The “nature” of the Bruins’ business involves being a world-class hockey club that plays half of its games away from Boston, all of which the Club tries to

win. Trans. 15:24-16:15, 17:20-24. “[T]he goal is pretty simple. We want to win every game, and every game is important to us.” Trans. 16:1-2. The Club’s business—and the NHL in general—simply could not function if the Club did not travel to away cities for half its games. Stips. ¶¶ 48-49. Failure to travel to and play in away games subjects the Club to financial penalties, requires indemnification of the away city team, and results in the forfeiture of the game and loss of playoff race points. Stips. ¶¶ 62-64.³

Moreover, part of being a world-class hockey club requires the Bruins’ employees to devote a significant amount of time to preparing for games. Trans. 14:25-15:20, 17:16-24, 26:15-23, 48:15-16. “[I]n all sports nowadays, the preparation is immense,” Trans. 26:17-18, “everything is based on being prepared for the game that night,” Trans. 48:15-16. Accordingly, the Bruins’ business activities do not consist simply of 60 minutes of ice time every couple nights, nor are the players’ duties limited to playing hockey. Far more time is spent preparing for a game than actually playing in it.

³ The nature of the Club’s use of the hotel is far different than that of a business that may hold occasional conferences at a hotel resort, or that has a single employee who might travel to a hotel for a business meeting. As a national sports team that is required, both by its league and by the very structure of its business, to travel away from its “home” city with a full complement of its employees, the Club is unique when compared to most other businesses in other industries.

This preparation means that the Travelling Hockey Employees must perform a significant portion of their responsibilities at the away city hotels. *See Vanicek*, 85 T.C. at 740 (residences situated at various locations on 64,000 acres of parkland were integral to the employees' responsibilities as "watchmen" of that land). Players, for example, utilize the hotel to discuss strategy with coaches and teammates to analyze the opposing club. *Stip.* ¶ 157. *Trans.* 25:1-26:3, 29:13-25, 50:15-51:8. In this regard, the coaches are "meeting with [the players] all the time." *Trans.* 55:5. By way of example, Exhibit 574-J is a short video of such a meeting held immediately following a breakfast in the Meal Room. Set forth below is a screenshot of that video:



Players also receive medical and sports treatments at the hotels, and they must stay in top-notch physical condition by using the hotel's gym and other facilities. Stip. ¶ 139. Trans. 31:6-22 (generally); Trans. 37:23-38:8, 39:13-24 (sports/medical treatments); Trans. 109:9-21, 137:8-22 (strength/conditioning). These activities are integral to winning games, and they make sense in the context of professional hockey, which is "a pretty grueling sport . . . definitely hard on the body," Trans. 33:16-20, and a "game with a very high chance of injury," Trans. 113:25-114:1. Because of this, it is simply not an option for a player to take a pass on the day's responsibilities at the hotel:

[W]e're trying to win a hockey game. And, you know, as I've often said to our players, one player not abiding by what we're trying to do as a team is one player too many. You need everybody to be there and be at their best to win hockey games. You can't afford to have players that aren't pushing in what we call the right direction.

Trans. 35:19-25. If a player is not pushing in "the right direction" while at the away city hotel, "[h]e can be a healthy scratch, he can be benched. He can be—a lot of things can happen to that player." Trans. 36:4-6. "[A]nything that is mandatory and that is not followed, there's consequences." Trans. 69:5-6.

Beyond the players, other Club employees have job responsibilities that require their use of the hotel. Coaches use hotel suites and meeting rooms to hold meetings, formulate and discuss game strategy, review film, and make roster

adjustments. Trans. 49:8-50:2. These activities are not sporadic or occasional—the Club’s coaching staff is “talking about our hockey club pretty well at any time and every time.” Trans. 54:9-11. Trainers use hotel suites, the hotel gym, and other facilities to train and condition the players, and to provide sports and medical treatments. Trans. 108:11-21. The public relations staff uses the hotel’s facilities to meet with players to discuss upcoming interviews and other public-facing matters. Trans. 56:3-20. The Club’s travel logistics coordinator is present at the hotel to ensure that the stay there runs smoothly and that the Club can perform the pre-game work that it needs to compete effectively. Trans. 57:8-25. All of these activities are part of the Club’s business:

BPHA’s business activities related to game play include all of the activities necessary for the Bruins to play home and away hockey games, including playing in the games themselves, coaching, athletic conditioning and training, medical care, player personnel activities (e.g., scouting, contract negotiations, and roster management), and administration (travel coordination, provision of meals, equipment management, etc.).

Stip. ¶ 260.

The foregoing activities are essential to winning games, and they cannot be performed in a satisfactory manner without utilizing the hotel as a base of operations. Games are played day after day, often requiring the Club to play games back to back on consecutive nights. Trans. 34:3-15, 43:7-20. The Club is

frequently travelling between away cities and Boston, sometimes arriving at its destination in the early morning hours. Trans. 18:21-19:18. Strategy discussions, roster changes, and other game-related activities must therefore occur at the away city hotel. *See, e.g.*, Trans. 51:14-52:8 (film review); Trans. 54:22-55:5 (team meetings). Additionally, if a player requires sports or medical treatments, waiting to return to Boston after a series of away games is simply not an option. “It’s imperative to treat the injuries right away. You can’t wait The quicker you treat it, the better chance they have of recovering quicker and returning to play . . . faster.” Trans. 112:6-11. Nor can players procrastinate regarding their training and conditioning regimes—when they do so, “[t]he fatigue factor starts to come in and their energy stores are reduced and their endurance is reduced, their strength is reduced, and basically their whole performance is reduced.” Trans. 127:24-128:2. Performing all these vital activities exclusively while in Boston is a non-starter. Trans. 51:14-52:8 (film review); Trans. 54:22-55:5 (team meetings); Trans. 56:21-57:7 (public relations); Trans. 58:10-59:16 (travel logistics); Trans. 39:2-16, 41:1-9 (sports/medical treatments); Trans. 35:4-12 (training/conditioning). Similarly, the Club could not perform all these activities exclusively at the away city arena, as it is often not available, nor does it have the necessary space or facilities. Trans. 86:24-87:1, 88:12-24. In sum, the Club’s business activities must consistently be performed at the away city hotel.

All the Bruins' hockey operations—the core of the Club's business—is transported from Boston to the away city the day before the game. While there, the Club uses the hotel to conduct the bulk of its business, which is vital to preparing for and winning the upcoming game. Accordingly, there is an “integral relationship” between the hotel and the Bruins' business activities. *See Benninghoff*, 71 T.C. at 221. The Bruins “need to make sure that [they] have hotel rooms and meal rooms in each city. Without them, [the Club] wouldn't really be able to do [its] job there.” Trans. 145:3-5. *See* PLR 8405075 (Nov. 2, 1983) (“[T]he emphasis is upon the place where duties of the employee are to be performed.”).

2. Hotels can be business premises.

The fact that a hotel can serve as a taxpayer's “business premises” is nothing new. The Tax Court has squarely addressed the issue. In *Mabley v. Commissioner*, T.C. Memo. 1965-323, 24 T.C.M. (CCH) 1794 (1965), the Tax Court held that hotel space used for mandatory lunches attended by a coal company's senior executive staff qualified as the employer's business premises for purposes of section 119. The one- to three-hour meals served

the purpose of providing the necessary daily contact among the president of the company and the members of his staff and . . . [they] conserv[ed] normal working hours which would otherwise be consumed by many daily

conferences among the various executives in the course of the business day.

Id. at 1796-97.

The Bruins' case is an even clearer example of when a hotel space becomes a taxpayer's business premises. Whereas in *Mabley* only senior executive staff (consisting of the company's president, vice presidents, and general counsel) participated in the luncheons, all Bruins employees who travel to an away city may attend the Pre-Game Meals, with player attendance required for all meals but the snack. Trans. 65:25-66:15 (breakfast); Trans. 82:15-83:12 (lunch); Trans. 85:9-17 (snack); Trans. 91:21-92:4 (brunch). Moreover, unlike in *Mabley*, the Bruins use the hotel to conduct their business throughout the course of their stay, not just during the several hours when meals are consumed. *See id.* at 1797 ("[T]he rented hotel suite in which the meals were furnished was acquired and actually used for the conduct of business of the company.").

3. The away city hotels were the Club's business premises even though the Club stayed at those hotels only several times a year.

The fact that the Club stays at away city hotels during only a portion of the year does not disqualify the hotels as business premises. An evaluation of the Club's business premises must take into account the "nature of the employer's business." *Vanicek*, 85 T.C. at 739-40; *Lindeman*, 60 T.C. at 615. By necessity, NHL teams must conduct half their business on the road. Stips. ¶¶ 48-49. The

Bruins bring a significant portion of their employees to each away city and set up shop there. Their business requires them to perform business activities both home *and* away. The fact that the Bruins' business premises vary among different cities does not affect the analysis—there exists no support for the notions that business premises must be at a fixed location, cannot be at multiple locations, or must be available to the employer 365 days of the year. Any such limitation of a business premises would undermine the *functional* nature of the test. *See Adams*, 585 F.2d at 1066. Indeed, the legislative history of section 119 indicates that business premises are *not* confined to “the primary business structure of the employer.” *See Benninghoff*, 71 T.C. at 220 (discussing the legislative history of section 119).

The Service's own rulings confirm this conclusion. In Rev. Rul. 71-411, 1971-2 C.B. 103, the Service concluded that business premises can arise in places away from where an employee would typically consider his “home base” to be, and that an employer can have multiple business premises. In that ruling, employees of a company's branch office obtained their meals at other branch offices that had eating facilities (the employees' own branches did not). Because the employer performed significant business at all the branch offices, the Service held that the meals were served on the employer's business premises, even though the employees did not work at the place where they ate. *See also* GCM 39246 (affirming the analysis of Rev. Rul. 71-411). The ruling demonstrates that the fact

that meals are served somewhere different from where an employee typically works is not fatal to a finding of business premises.

The Bruins' case is an even easier one: The Travelling Hockey Employees work both at home and at the away hotels, whereas in the ruling the company's employees did not work in the branches that had the eating facilities.

Several courts have similarly concluded that an employee can have multiple business premises, essentially wherever he works. For example, they have held that state troopers' business premises are deemed to be not just their station house, but also the many locations all over the state where they travel. *See, e.g., United States v. Morelan*, 356 F.2d 199, 203 (8th Cir. 1966) (“[A]ll state land [is] the business premises of the state.”); *United States v. Barrett*, 321 F.2d 911, 912 (5th Cir. 1963) (“[M]ajor ‘business’ of [state police] is obviously not confined to isolated station houses; rather, it covers every road and highway in the state.”).

Beyond the nature of the Club's business, the duties of its employees confirm that the away city hotels are the Club's business premises. *See Anderson*, 371 F.2d at 67 (asking where “the employee performs a significant portion of his duties”). As detailed above, all the Club's employees have responsibilities that must be performed at the away city hotels. Players, for example, must attend the pre-game breakfast, lunch, and brunch held in the hotel Meal Room. Trans. 60:17-61:16, 65:2-66:15, 69:2-16, 90:6-19, 91:3-92:4. The players must also abide by

strict curfews to be in their rooms by 11 p.m. because “we want our guys to have a proper night’s rest before game time.” Trans. 19:24-25. Failure to abide by these rules subjects the players to fines and being scratched from a game. Stip. ¶ 145. Trans. 70:14-71:16. The Club’s employees utilize other hotel facilities, in addition to the Meal Room, such as the gym, pool, and suites in connection with performing their responsibilities. Stip. ¶ 139. Trans. 32:3-24, 39:17-24, 108:11-109:8, 109:22-110:4. The Club simply could not conduct its business effectively absent its use of the away city hotel.

Based on all the foregoing, the hotel serves as the Club’s business premises. See *Lindeman*, 60 T.C. at 614-15 (focusing on the “employee’s duties as well as the nature of the employer’s business”); *Anderson*, 371 F.2d at 67 (asking where “the employee performs a significant portion of his duties or . . . where the employer conducts a significant portion of his business”); GCM 39246 (stating that “the touchstone of the business premise test is the [place’s] relationship to the business activities of the employer” (quoting *Benninghoff*, 71 T.C. at 221)).⁴

⁴ The nature of the Bruins’ business requires that they travel to approximately 20 different away cities each year, and prepare for upcoming games in the same number of hotels. Although this means that the Bruins have approximately 20 different business premises during the course of a year, this is consistent with the Tax Court’s admonition that an evaluation of an employer’s business premises must take into account the “nature of the employer’s business.” *Vanicek*, 85 T.C. at 739-40; *Lindeman*, 60 T.C. at 615.

B. The Revenue Derived from the Club's Eating Facilities at Hotels Equals or Exceeds the Direct Operating Costs of Those Facilities.

For an employer-operated eating facility to be treated as a de minimis fringe under section 132(e)(2), the revenue derived from the facility must equal or exceed the direct operating costs of the facility.⁵ This Court has referred to this requirement as the “revenue/operating cost test.” *Boyd Gaming*, 106 T.C. at 348. The eating facility meets this test if the meals are subject to exclusion from the employees’ income under section 119. *See* sec. 132(e)(2); *Boyd Gaming*, 106 T.C. at 350-53. Section 119 permits an employee to exclude from income the value of an employer-provided meal if the meal is furnished (1) on the business premises of the employer and (2) for the convenience of the employer. As discussed above, the Bruins’ Pre-Game Meals are furnished on the Bruins’ business premises—at the hotels where the Club stays and conducts its business prior to an away game.

Whether meals are furnished for the convenience of the employer is a question of fact. Sec. 1.119-1(a)(1), Income Tax Regs. Meals furnished by an employer without charging the employees are regarded as furnished for the convenience of the employer if the meals are provided “for a substantial noncompensatory business reason of the employer.” Sec. 1.119-1(a)(2)(i), Income

⁵ The away city hotel’s qualification as an employer-operated eating facility is described in section I.C of this brief, below.

Tax Regs. One example of a noncompensatory business reason is “when the meals are furnished to the employee during his working hours because the employee could not otherwise secure proper meals within a reasonable meal period.” Sec. 1.119-1(a)(2)(ii)(c), Income Tax Regs. Importantly, “a meal need not be indispensable to an employee’s duties to be excludable under section 119.” *Boyd Gaming v. Commissioner*, T.C. Memo. 1997-445, slip op. at 58-59, *rev’d*, 177 F.3d 1096 (9th Cir. 1999).

In *Boyd Gaming*, 177 F.3d 1096, the Ninth Circuit held that a casino operator that provided meals to its employees, who were required by the casino to stay on premises, had provided the meals for the convenience of the employer. The court stated that once the employer had imposed a “stay-on-premises” policy, the “captive” employees had no choice but to eat on premises, and that the meals were therefore “indispensable to the proper discharge” of their duties. *Id.* at 1101. As a result, the meals were provided for the convenience of the employer based on a “business-necessity theory.” *Id.* at 1100-01 (citing *Commissioner v. Kowalski*, 434 U.S. 77, 93 (1977)).

Similarly, in *Mabley*, the Tax Court held that meals were provided for substantial noncompensatory business reasons when staff members were required to attend meals “for the purpose of providing the necessary daily contact among the president of the company and the members of his staff and for the purpose of

thereby conserving normal working hours.” *Mabley*, 24 T.C.M. at 1796. In drafting section 119, Congress intended this particular result (i.e., where an employee is required to accept a meal as part of his job, the convenience of the employer standard is deemed satisfied). See *Kowalski*, 434 U.S. at 93 (“Finally, although the Senate Report did not expressly define ‘convenience of the employer’ it did describe those situations in which it wished to reverse the courts and create an exclusion as those where ‘an employee must accept . . . meals or lodging in order properly to perform his duties.’” (quoting S. REP. NO. 1622, 83d Cong., at 190 (1954))).

Once a taxpayer substantiates a business reason for providing meals to its employees, the courts and the Service will not second-guess those reasons. As stated in *Boyd Gaming*, so long as the employer provides “adequate evidence of legitimate business reasons” for its policy, the court will not “second guess these reasons or . . . substitute a different business judgment,” even if reasonable minds could disagree on the merits of that policy. *Boyd Gaming*, 177 F.3d at 1101.⁶ In Action on Decision 1999-010, the Service acquiesced in the decision in *Boyd*

⁶ This is particularly the case where Petitioners’ evidence at trial was unimpeached and uncontradicted by the introduction of any witnesses called by the Commissioner and only very limited cross examination of Petitioners’ witnesses. See *Boyd Gaming*, 177 F.3d at 1100 (courts and the Commissioner “may not substitute a business judgment that is contrary to the unimpeached and uncontradicted evidence presented by the taxpayer) (citing *Caratan v. Commissioner*, 442 F.2d 606, 609-10 (9th Cir. 1971)).

Gaming and echoed the appellate court’s view, stating that the Service “will not attempt to substitute its judgment for the business decisions of an employer as to what specific business policies and practices are best suited to addressing the employer’s business concerns.” As long as the employer’s policies are “reasonably related to the needs of the employer’s business . . . and . . . these policies are in fact followed in the actual conduct of the business,” then the convenience of the employer test is satisfied. *Id.*

As in *Boyd Gaming*, the Bruins have a policy that requires the players to stay on the hotel premises. For example, the players are subject to a curfew the night before the away game, Stip. ¶ 144, they are required to attend meetings and meals at the hotels, Trans. 30:15-31:5, strength training and conditioning at the hotel is mandatory, Trans. 33:4-9, and when injured or sick, players are required to receive sports and medical treatments at the hotel, Trans. 37:23-38:8. In light of this “stay-on-premises” policy, the “captive” players have no choice but to eat at the hotel, and the Pre-Game meals are therefore “indispensable to the proper discharge” of their duties. *See Boyd Gaming*, 177 F.3d at 1101. Furthermore, and as in *Mabley*, with the exception of the pre-game snack, the Pre-Game Meals are mandatory for players, who are subject to fines or to being scratched from the game if they miss them. Trans. 60:17-61:16, 65:2-66:15, 69:2-16, 70:14-71:16, 90:6-19, 91:3-92:4.

Finally, the Bruins' policies that require players to stay on the hotels' premises and to attend the Pre-Game Meals are supported by "legitimate business reasons." The Pre-Game Meals allow the Club to control the players' nutrition, which is necessary "[b]ecause their body needs that type of nutrition in order to excel at their jobs." Trans. 75:9-10. The players' participation in these meals is therefore critical to the Club's goal of playing, and winning, professional hockey games. Trans. 69:2-16, 75:6-14, 119:3-8, 156:4-12. For this reason, the meals are mandatory and conform with strict nutritional guidelines. Stip. ¶ 203. Allowing players to eat at the hotel's restaurant or other local eateries is not an option, as these locations do not afford the Club the control over the players' diets that it requires. Trans. 65:8-24, 75:15-76:4, 78:20-79:24, 88:5-11, 88:25-89:7.

Respondent's own Motion in Limine to Exclude the Testimony of Don DelNegro recognizes that "the parties agree to the importance of nutritious food being consistently available to the player[s]" and that "the parties have already agreed that a nutritious pre-game meal is important." Respondent's Motion in Limine at ¶¶ 27 and 28. Respondent cannot concede, on the one hand, that the meals are important and confer benefits on the players and the Club, and on the other hand assert that the meals are not provided for the convenience of the employer. *See* AOD 1999-010 (the Service "will not attempt to substitute its judgment for the business decisions of an employer"); *Boyd Gaming*, 177 F.3d at

1101 (stating that the court would not “second guess these reasons or . . . substitute a different business judgment,” even if reasonable minds could disagree on the merits of that policy).

Beyond their nutritional value, the Pre-Game Meals also help the Club maximize the time available to prepare for an upcoming game. In this regard, the meals provide an opportunity for the Travelling Hockey Employees to meet with each other to formulate strategy for the upcoming game and to develop responses to media inquiries. Stips. ¶¶ 155, 157, 177-178, 189-190. Trans. 74:17-25, 91:17-20. The Club is also “on a pretty tight schedule, and it’s important to try and minimize the players’ time of running around to look for those kind of things [restaurants] when you can supply it to them and give them the proper meals.” Trans. 75:24-76:3. “[I]t’s obviously a lot more efficient, it’s a lot smarter, it’s a lot easier to have [the Pre-Game Meals] done at the hotel where we stay.” Trans. 89:4-7. For all these reasons, the Club provides the Pre-Game Meals for its convenience.⁷ See *Kowalski*, 434 U.S. at 93; *Mabley*, 24 T.C.M. at 1796.

⁷ As Respondent’s Pre-Trial Memorandum acknowledges, at page 51, “[i]f petitioners substantiate that the meals were provided to the players . . . for [the Club’s] convenience pursuant to I.R.C. 119(b)(4), the remaining pre-game meals provided to the other [Club] employees would be considered provided for the convenience of [the Club].”

C. The Meal Rooms Are Employer-Operated Eating Facilities.

Section 132(e)(2) requires that meals be provided in an “eating facility.”

Section 1.132-7(a)(2), Income Tax Regs., defines an employer-operated eating facility as follows:

An employer-operated eating facility for employees is a facility that meets all of the following conditions—

- (i) The facility is owned or leased by the employer,
- (ii) The facility is operated by the employer,
- (iii) The facility is located on or near the business premises of the employer, and
- (iv) The meals furnished at the facility are provided during, or immediately before or after, the employee’s workday.

As discussed above, the hotel Meal Rooms are located on the Club’s business premises—the away city hotel—thus satisfying the third requirement for an employer-operated eating facility. Respondent has also acknowledged that the Club has “substantiated the fourth requirement that the meals are provided during, or immediately before or after, the employee’s workday.” Respondent’s Pre-Trial Brief at p. 31. As described below, the Meal Room satisfies the other two requirements in the regulations (the first two items quoted above) and is therefore an “eating facility.”

1. The Club leases the eating facility.

The Club contracts with away city hotels to lease the Meal Room. The regulations do not provide a specific definition of a “lease.” “When a word is

undefined in a statute, it is a fundamental canon of statutory construction that it will be interpreted as taking its ordinary, contemporary, common meaning.” *Payless Cashways Inc. v. Commissioner*, 114 T.C. 72, 77-78 (2000) (citing *Commissioner v. Soliman*, 506 U.S. 168, 174 (1993); *Perrin v. United States*, 444 U.S. 37, 42 (1979)). The common definition of a lease is a “contract by which a rightful possessor of real property conveys the right to use and occupy the property in exchange for consideration.” Black’s Law Dictionary 970 (9th ed. 2009); *see also* sec. 48.4217-1, Manuf. & Retailers Excise Tax Regs. (“The term ‘lease’ means a contract or agreement, written or verbal, which gives the lessee an exclusive, continuous right to the possession or use of a particular article for a period of time.”); Rev. Rul. 77-397, 1977-2 C.B. 178 (offering a similar definition in the context of section 465(c)(1)(C)). Moreover, under Respondent’s own guidance, a lease does not require separate consideration when incident to a sale, and a sales invoice can function in part as an implicit lease agreement even when the invoice does not explicitly refer to a lease or the item being leased. *See* Chief Counsel Memorandum, PMTA-2016-14 (Aug. 17, 2015), available at <https://www.irs.gov/pub/irao/pmta-2016-14.pdf> (stating that the temporary provision of a medical instrument attendant to the sale of a medical device constituted a lease of the instrument under sections 4216 and 4217 even when the

invoice for the device did not include a separate charge for the use of the instrument).⁸

The Bruins enter into BEOs and hotel agreements with each hotel for the right to use and occupy the Meal Rooms. These agreements memorialize the specifics of what the hotel will provide with respect to the Meal Rooms. In all cases, and on a meal-by-meal basis, the BEOs identify the Meal Room name, the dates and times that the Club may occupy and use the room, anticipated attendees, and the requisite furnishings. Stip. ¶ 104. Exhs. 82-J to 178-J. Trans. 169:18-170:6. Each BEO makes clear that the room is designated for the consumption of the Pre-Game Meals by listing the menu to be provided during each meal. Exhs. 82-J to 178-J. In a complementary manner, many of the hotel contracts (and not just the BEOs) contain overlapping terms related to the lease of the Meal Room, describing among other things the dates and times when the Club may occupy and use the Meal Room, the room's location and name, and the manner in which the room will be used (e.g., for a buffet-style meal). *See, e.g.*, Exh. 23-J, BRU0000090; Exh. 24-J, BRU0000109; Exh. BRU 40-J, BRU0000745. Both the

⁸ Respondent should not be permitted to take a position in this litigation that is contrary to that set forth in his published Chief Counsel Memorandum. *See Rauenhorst v. Commissioner*, 119 T.C. 157 (2002) (considering a published ruling to be a concession by the Internal Revenue Service (IRS) of the legal point in question); *Dover Corp. v. Commissioner*, 122 T.C. 324 (2004) (finding PLRs and GCMs illustrative of the IRS's administrative position regarding substantive tax issues).

BEOs and the hotel contracts require the Bruins to pay certain amounts to the hotel as consideration for all the rights, amenities, and food that they are procuring in these agreements.

In exchange for this consideration, the Bruins have the “right to use and occupy” the Meal Room in the manner set forth in the BEOs and hotel agreements. *See Black’s Law Dictionary* 970 (9th ed. 2009) (a lease is a “contract by which a rightful possessor of real property conveys the right to use and occupy the property in exchange for consideration”). But for the purchase of the meals and hotel rooms, the Club would not be afforded access to or use of the Meal Room. Trans. 149:20-150:20.

Numerous other aspects of these agreements make clear that the Meal Room is leased to the Club. For example, the Club dictates how the room will be furnished, whether A/V equipment or a white board with markers will be needed, whether a coat rack will be present, etc. Stip. ¶ 198. Trans. 172:22-173:1. The Club is also entitled to, and does, use the same room throughout the course of the day, including for non-meal purposes such as post-meal meetings and film review. Trans. 176:19-22. The Club dictates the level of privacy associated with its use of the room, requiring that the hotel refrain from posting any identifying information associated with the Club’s use of the room. Stip. ¶ 199. Trans. 169:6-17. The Club is entitled to control access to the eating facility, and it excludes the public

and press from accessing the room during the lease term. Trans. 66:16-22. And the Club dictates which hotel employees will be present in the dining room, at what times, and for what purposes. Trans. 159:15-160:25, 177:10-178:11. All of these items are hallmarks of a leased premises.

2. The Club contracts with the hotel to operate the eating facility.

The Club is deemed to operate the eating facility because “[i]f an employer contracts with another to operate an eating facility for its employees, the facility is considered to be operated by the employer.” Sec. 1.132-7(a)(3), Income Tax Regs.

As an initial matter, the agreements that the Club enters into with the hotels are contracts. Respondent’s Pre-Trial Memorandum attempts to obfuscate the contractual nature of these agreements by employing various other labels to describe them, including terms such as “hotel agreements,” “meal order agreements,” and “letter agreements.” Respondent’s Pre-Trial Memorandum, *passim*. Regardless of the label Respondent attaches to the contracts, the substance remains the same—each agreement (whether a BEO or a hotel room agreement) represents an agreement, in writing, offered by one party and agreed to by the other, executed by both the Club and the hotel, referring to consideration, and setting forth the various promises and conditions related thereto.

The BEOs set forth the contractual agreement between the Club and the hotel regarding the operation of the eating facility. The Club first provides a

customized meal menu to the hotel—the Club is not simply ordering off of a pre-set or hotel-dictated menu. Trans. 151:7-20. In return, the hotel prepares a BEO that sets forth the contractual agreement regarding the type of food that will be provided, the manner in which it will be prepared, the amount that will be provided, and the manner in which it will be served. Stip. ¶ 104. Exhs. 82-J to 178-J. Trans. 169:18-170:6. The BEOs also detail the estimated number of attendees at each meal, the furnishings and setup of the Meal Room, and the staff that the hotel will provide to serve the food. *Id.*

In return for the hotel operating the eating facility in the manner directed by the Club, and as agreed in the BEO, the Club pays a per-meal fee. Exhs. 82-J to 178-J. The Club also agrees to pay for the utilization of individual chefs to prepare items such as omelets during Pre-Game Meals. *Id.* And, critically, the Club agrees to pay a substantial service fee of up to 22 percent of the cost of the meals. Trans. 161:1-15, 172:15-21. This fee relates to the services provided during the meal, from the preparation of the meal by the hotel's chefs to the dining captains, waiters, waitresses, and other support services related to the meal. *Id.*

Put simply, the Club dictates to the hotel each detail of how the Pre-Game Meals will be prepared and served, with the BEOs contractually memorializing the hotel's agreement to operate the eating facility and provide the meals in

accordance with those directions. In this way, the Club “contracts with another to operate an eating facility for its employees.” Sec. 1.132-7(a)(3), Income Tax Regs.

3. The room where the Pre-Game Meals are served is an eating facility.

Because the Meal Room satisfies the four elements of section 1.132-7(a)(2), Income Tax Regs., the Club, by definition, operates an eating facility.

Respondent’s Pre-Trial Memorandum, quoting Chief Counsel Advice (CCA) 201151020 (Dec. 23, 2011), suggests that beyond meeting this regulatory definition, the eating facility must also be “an identifiable location that is designated for the preparation and/or consumption of meals.” Respondent’s Pre-Trial Memorandum at 29. This theory is unavailing, for two reasons.

First, Respondent cannot by fiat add legal requirements that do not appear anywhere in the governing statute or regulations.

Second, simply for argument’s sake, the Meal Rooms would satisfy this additional requirement proposed by Respondent. As an initial matter, both the Club and the hotels contractually identify and designate the room where the Pre-Game Meals will be consumed. In this regard, every Pre-Game Meal was described by a BEO that set forth, among other information, the room location and the date and time for each of the meals. Stip. ¶ 104. Exhs. 82-J to 178-J. Trans. 169:18-170:6. The Club relied on this identifying information to inform its

employees where the Pre-Game Meals would be held. The Club did this by listing the room identified in the BEOs on daily itineraries provided to all the Club's Travelling Hockey Employees. Exhs. 325-J to 402-J. Trans. 60:17-61:16.

In addition to being identified and designated as the room where meals would be consumed, the Meal Rooms exhibit all the features that one would expect to be found in an eating facility. For example, the dining rooms are positioned close to the hotel's on-site kitchens where the food is prepared, and throughout the course of the meal they are staffed by chefs, dining captains, and waiters and waitresses to attend to dining-related requests from the Club's employees. Stip. ¶ 197. Exhs. 82-J to 178-J. Trans. 170:25-171:16. The dining rooms also include all the fixtures that one would expect in an eating facility, including tables with tablecloths, chairs, banquet tables lined with chafing dishes containing cold and hot foods, plates, silverware, glasses, and various stations for the preparation of fresh foods such as omelets. Exhibit 574-J, a video of a Club meeting held after a Pre-Game Meal, a screenshot of which is set forth above on page 38, depicts many of these features.

Finally, both the regulations and this Court's prior decisions suggest that the term "eating facility" is to be afforded an expansive meaning. For example, in *Boyd Gaming*, T.C. Memo 1997-445, the Court listed a number of "eating facilities," including "fast food restaurants, competitor casino restaurants, ethnic

restaurants, sandwich shops, pizza houses, *food courts*, and *convenience stores*” (emphasis added). Moreover, the regulations note that not only can cafeterias and dining rooms be eating facilities, but even the expenses of “vending machines” are to be treated as part of the costs associated with an eating facility. Sec. 1.132-7(b)(1)(ii), Income Tax Regs. If food courts, convenience stores, and vending machines are eating facilities for purposes of section 132(e)(2), then so too are the hotel dining rooms used by the Club.

D. The Club Provides the Pre-Game Meals in a Non-Discriminatory Manner.

Section 132(e)(2) provides that the provision of a meal to a highly compensated employee at an employer-operated eating facility will be treated as a de minimis fringe—and such amount will not be subject to the 50 percent limitation of section 274(n)(2)(B)—only “if access to the facility is available on substantially the same terms to each member of a group of employees which is defined under a reasonable classification set up by the employer which does not discriminate in favor of highly compensated employees.” In effect, a two-part inquiry is required: (1) whether the classification is reasonable, and (2) whether the classification discriminates. *See id.* Each of these two inquiries is based on a facts-and-circumstances determination. *See* secs. 1.132-8(c)(1), -8(d)(1), Income Tax Regs.

With respect to the first inquiry, a “[r]easonable classification[] generally include[s] specified job categories, nature of compensation (i.e., salaried or hourly), geographic location, and similar bona fide business criteria.” Sec. 1.410(b)-4(b), Income Tax Regs.⁹ Similarly, an employer may establish a reasonable classification based on such factors as seniority, full-time versus part-time employment, or job description. *See* House Ways and Means Committee Report on the Deficit Reduction Act of 1984, H.R. REP. NO. 98-432, Pt. 2, at 1606 (1984).

Here, the group of Club employees who are eligible for free meals is defined under a “reasonable classification.” The Pre-Game Meals are made available to *all* the Club’s employees who travel with the Club to away games. Trans. 65:25-66:15 (breakfast); Trans. 82:15-83:12 (lunch); Trans. 85:9-17 (snack); Trans. 91:21-92:4 (brunch). This classification is based on reasonable business criteria such as “geographic location” (i.e., employees located in away cities), “specified job categories” (i.e., the Club’s Travelling Hockey Employees), and job descriptions (i.e., employees required to travel to away games). *See* H.R. REP. NO. 98-432, Pt. 2, at 1606 (1984); *see also* sec. 1.410(b)-4(b), Income Tax Regs.

⁹ This regulation applies by virtue of the cross reference in section 1.132-9(d)(1), Income Tax Regs., to section 410(b)(2)(A)(i).

With respect to the second inquiry, the reasonable classification established by the Club did not discriminate based on whether the members of the group so classified were highly compensated. The Club made the Pre-Game Meals available to *all* employees who travelled with the Club to away games. This policy did not involve any discrimination based on how much money each employee made. Accordingly, the Club provided the Pre-Game Meals to *both* highly compensated employees *and* non-highly compensated employees.

More specifically, for purposes of the tax years at issue here, a highly compensated employee was one who received compensation from the Club in excess of \$110,000. *See* secs. 132(j)(6) and 414(q)(1) (specifying that the Department of Treasury will regularly adjust the highly compensated employee compensation threshold); secs. 1.132-8(f)(1)(ii) and (iv), Income Tax Regs.; IRS Notice 2008-102, 2008-2 C.B. 1106 (announcing 2009 threshold); IRS Notice 2009-94, 2009-2 C.B. 848 (announcing 2010 threshold). As set forth in Exhibit 588-J, of the 54 players who travelled with the Club to away games in 2009 and 2010, 10 players (nearly 20 percent) were not highly compensated employees during at least one of the two years at issue. Moreover, and as set forth in Exhibit 589-J, of the 42 coaches, trainers, public relations staff, and other staff members who travelled with the Club to away games, at least 22 (more than 50 percent) were not highly compensated employees. In total, fully one third of the Travelling

Hockey Employees were not highly compensated employees for at least one of the two years at issue. In light of this, and more importantly because any Travelling Hockey Employee who wanted to eat a Pre-Game Meal was entitled and invited to do so, the meals were provided in a manner that did not discriminate based on whether an employee was highly compensated.¹⁰

E. Permitting a Full Deduction of the Pre-Game Meals Comports with Congress's Intent in Promulgating Code Section 274(n).

Allowing Petitioners to deduct 100 percent of the Pre-Game Meal costs comports with the purpose of section 274(n), which is designed to prevent employers from “deducting too many personal living expenses as business expenses, thereby charging a large part of their cost to the Federal Government.” S. REP. NO. 99-113 at 67 (1986). The 50-percent limitation aims to address the fact that business-related meal expenditures still “convey substantial personal benefits to the recipients.” *Id.* at 68. At the same time, when these “personal benefits” are no longer substantial, such as in the case of de minimis fringe benefits, then a full deduction is allowed. In this regard, the section 119 exclusion—and the related

¹⁰ Even if access to an eating facility discriminates in favor of highly compensated employees, access to the eating facility by employees who are not highly compensated can still be treated as a de minimis fringe with respect to those specific employees. *See* sec. 132(e)(2). Accordingly, even if the Club provided meals in a manner that was discriminatory, the provision of meals to those individuals who were not highly compensated during 2009 and 2010 would still be treated as a de minimis fringe, and Petitioners would be entitled to fully deduct the related expenses.

full deduction allowed by section 274(n)(2)(B)—for meals eaten on the employer’s business premises makes sense: If an employee has to eat at work due to the special nature of his job, it is not likely that he is getting great personal satisfaction from the meal.

The Tax Court has confirmed that Congress intended to allow the full deduction in these circumstances, when the meals are not “inherently personal.” *See Boyd Gaming*, 106 T.C. at 353 (“In contrast with the abuses that the Congress meant to address in enacting Code section 274(n)(1), we see no abuse that would be curtailed by denying petitioners a full deduction for the cost of their employee meals. Indeed, petitioners’ provision of employee meals is a far stride from the abuses that the Congress chose to address in their promulgation of Code section 274(n)(1).”).

Here, the Pre-Game Meals are critical to the Club’s business and result in only marginal personal benefits to the recipients. No doubt, many of the players would prefer to eat elsewhere if they could—at a different location, with a different menu, and with different people. The Pre-Game Meals are not provided as a perk or incentive to the players. Rather, the meals are carefully structured and selected for their nutritional value and to enhance the players’ physical preparation. For the coaches and other non-player employees who also take part in these meals, the meals are “merely incidental” to the overarching purpose of the related business

meetings, *see Mabley*, 24 T.C.M. at 1797, as they allow these individuals to be close to the players up until game time. Indeed, some coaches may not even eat the meals at all, as they may spend their “meal” time meeting with players and reviewing film. The benefit to these employees of having a meal served at the hotel is therefore marginal at best. In sum, these meals are a “far stride” from the abuses that section 274(n)(1) was designed to eliminate. *See Boyd Gaming*, 106 T.C. at 353.

II. The Expenses for Entertainment Exception Applies.

The cost of the meals that the Bruins provide to their players is part of the expenses that they incur to provide hockey entertainment to their fans. Section 1.274-2(f)(2)(ix), Income Tax Regs., which expands on section 274(e)(8), provides an exception from the 50-percent limitation for “[a]ny expenditure by a taxpayer for entertainment . . . to the extent the entertainment is sold to customers in a bona fide transaction for an adequate and full consideration in money.” The regulation provides two examples of fully deductible costs: (1) a night club owner’s costs for “*producing* night club entertainment (such as salaries paid to employees of night clubs and amounts paid to performers)” and (2) a cruise-ship owner’s costs for “*operating* a pleasure cruise ship as a business.” *Id.* (emphases added). According to the legislative history, Congress passed section 274(e)(8) “to insure that a taxpayer who sells entertainment to others will be allowed to deduct

expenses of producing that entertainment.” H.R. REP. NO. 1447, 87th Cong., 2d Sess. (1962).

The players provide entertainment during a hockey game, and that entertainment is “sold . . . in a bona fide transaction” by the Club to the fans who watch the Club’s games. Stips. ¶¶ 68, 235. Providing the Pre-Game Meals is a component of this entertainment. Trans. 69:2-16, 75:6-14, 119:3-8, 156:4-12. More specifically, producing a hockey game entails not only compensating or suiting up the players, but also preparing them, through proper nutrition and a consistent schedule, both for the upcoming game and more generally for the duration of the entire NHL season. The Club is therefore no different from a circus that must incur costs to train, feed, and care for its elephants prior to a performance. (The players might not be keen on this analogy, but it is apt nonetheless.) The circus’s food costs would be fully deductible. Similarly, the Club’s Pre-Game Meals are integral to “operating” a professional hockey club and “producing” an entertaining game for the fans. *See* sec. 1.274-2(f)(2)(ix), Income Tax Regs.

The entertainment (i.e., hockey games) sold to the Bruins’ fans is part of a bona fide transaction in exchange for consideration in money. First, the Club contracts with local and national sports program broadcasters to televise the Bruins’ home *and* away games. Stips. ¶¶ 235-238. Similarly, the Club also

contracts with radio broadcasters to broadcast Bruins games (again, both home *and* away) on the radio. *Id.* The revenue derived from these contracts represents over a quarter of the Club's annual revenues, evidencing the consideration paid to the Club in exchange for the entertainment that it produces. Exh. 578-J, BRU0000527.

Second, the Club sells tickets to fans who watch their home games in Boston. Although the Pre-Game Meals are provided during the Club's away trips, they are essential to ensuring that players remain healthy and perform at their peak throughout the course of the entire season. Trans. 75:6-14, 119:3-8, 121:2-7. In this manner, the Pre-Game Meals are essential to the players' overall performance, and thus to the entertainment provided to fans who attend the Bruins' games in Boston. As with the broadcast of the Club's games, the purchase of tickets by hockey fans constitutes consideration to the Club; these gate receipts account for over half of the Club's annual revenues. Exh. 578-J, BRU0000527.

Accordingly, Petitioners should be entitled to fully deduct the cost of the Pre-Game Meals as an expense incurred in connection with entertainment provided by the Bruins to their fans.

CONCLUSION

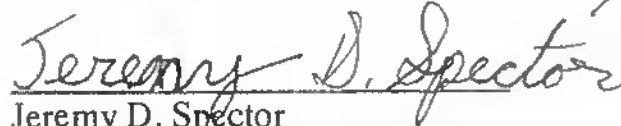
For all the reasons set forth herein, Petitioners are entitled to fully deduct the costs of the Pre-Game Meals consumed during the Bruins' away games.

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Respectfully submitted,



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